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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 ROBERT J. LUMPKIN,

11 Plaintiff,

12 v.

13 WASHINGTON CORRECTION CENTER,

14 Defendant.  
15

No. C09-5045 FDB/KLS

**REPORT AND RECOMMENDATION  
NOTED FOR: June 19, 2009**

16 This civil rights action has been referred to the undersigned United States Magistrate  
17 Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. The  
18 Court ordered Plaintiff Robert J. Lumpkin to file an amended complaint or show cause  
19 explaining why this matter should not be dismissed for failure to state a claim under 42 U.S.C. §  
20 1983. Dkt. 9. In response, Mr. Lumpkin filed two proposed civil rights complaints (Dkts. 10  
21 and 11), a motion to proceed in civil rights complaint (Dkt. 13) and a proposed petition for writ  
22 of habeas corpus. Dkt. 12. The proposed civil rights complaints suffer from similar deficiencies  
23 as Mr. Lumpkin's original complaint and the undersigned concludes that further amendment  
24 would be futile.  
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1 Mr. Lumpkin's proposed writ of habeas corpus must be dismissed because he has not  
2 presented this court with any indication that he has exhausted his state court remedies.

### 3 I. BACKGROUND

4 On March 17, 2009, Mr. Lumpkin was granted leave to proceed *in forma pauperis* (Dkt.  
5 7) and the Clerk filed his Complaint. Dkt. 8. In his original complaint, Mr. Lumpkin named the  
6 Washington Corrections Center as Defendant and alleged that he is being wrongfully held past  
7 his earned release date. Dkt. 8, p. 3 Mr. Lumpkin stated that he was sentenced to 15 months  
8 imprisonment, that King County gave him four months good time, and that he has been  
9 incarcerated for 11 months. *Id.* Mr. Lumpkin's earned early release date is January 19, 2009  
10 and he alleged that, although he has not done anything wrong, the Department of Corrections  
11 (DOC) refuses to release him from prison. *Id.* Mr. Lumpkin alleged that the DOC's refusal to  
12 release him violates his constitutional right to liberty of freedom. *Id.* According to documents  
13 filed with his proposed complaint, Mr. Lumpkin was convicted of a domestic violence no contact  
14 order and his maximum release date is May 21, 2009. Dkt. # 4, p. 7.

17 By Order dated March 25, 2009, the Court ordered that Mr. Lumpkin file an amended  
18 complaint or show cause why his complaint should not be dismissed. Dkt. 9. The Court advised  
19 Mr. Lumpkin that his pleading was deficient because (1) there is no constitutional or inherent  
20 right of a convicted person to be conditionally released before the expiration of his sentence as  
21 he has no liberty interest under the Fourteenth Amendment in an early release into community  
22 custody; (2) when a person confined by government is challenging the very fact or duration of  
23 his physical confinement and the relief he seeks will determine that he is or was entitled to  
24 immediate release or a speedier release, his sole remedy is a writ of habeas corpus; and (3) he  
25 failed to properly identify the individuals who allegedly caused him harm. *Id.*

1 On April 8, 2009, Mr. Lumpkin filed a proposed First Amended Complaint (Dkt. 10), a  
2 proposed Civil Rights Complaint (Dkt. 11), and a proposed Petition for Writ of Habeas Corpus  
3 (Dkt. 12). On May 5, 2009, Mr. Lumpkin filed a Motion to Proceed in Civil Rights Complaint  
4 Due to Discrimination. Dkt. 13. In the pleadings purporting to proceed as civil rights actions,  
5 Mr. Lumpkin alleges that Mark Stigall, his counselor, and Stella Jennings, a reentry specialist,  
6 violated his due process rights and discriminated against him by not assisting him in obtaining a  
7 release address and not telling him of transitional housing available for inmates without funds.  
8 He also asserts that his due process rights were violated because his good time credits were taken  
9 without legitimate reason. Dkts. 10, 11 and 13.

11 In his proposed petition for writ of habeas corpus, Mr. Lumpkin alleges that he was  
12 sentenced to 15 months and received four months good time credit from King County Jail, and  
13 that he has been in prison 11 months and was supposed to be released from prison on January 19,  
14 2009, but the DOC has not yet released him. Dkt. 12. On the face of his habeas petition, Mr.  
15 Lumpkin indicates that he has not exhausted his state judicial remedies, either on direct appeal or  
16 through collateral proceedings, by presenting the highest state court available with an  
17 opportunity to rule on the merits of each and every issue he seeks to raise in federal court.

## 19 II. DISCUSSION

20 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v.*  
21 *Murphy*, 745 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a  
22 claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma*  
23 *pauperis* complaint before service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809  
24 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).  
25 The court must construe the pleading in the light most favorable to plaintiff and resolve all  
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1 doubts in plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Unless it is  
2 absolutely clear that amendment would be futile, however, a *pro se* litigant must be given the  
3 opportunity to amend his complaint to correct any deficiencies. *Noll*, 809 F.2d at 1448.

4 Although complaints are to be liberally construed in a plaintiff's favor, conclusory  
5 allegations of the law, unsupported conclusions, and unwarranted inferences need not be  
6 accepted as true. *Id.* While the court can liberally construe plaintiff's complaint, it cannot supply  
7 an essential fact an inmate has failed to plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of*  
8 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

10 To state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct  
11 complained of was committed by a person acting under color of state law and that (2) the  
12 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws  
13 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*,  
14 *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an  
15 alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350,  
16 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

18 A plaintiff must also allege facts showing how each individually named defendant caused  
19 or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d  
20 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on  
21 the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*  
22 *Services*, 436 U.S. 658, 694 n. 58 (1978). A theory of *respondeat superior* is not sufficient to  
23 state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

25 On the basis of these standards, the undersigned concludes that Mr. Lumpkin has failed to  
26 state a claim upon which relief can be granted.

1 As Mr. Lumpkin was previously advised, when a state prisoner challenges the fact or  
2 duration of his confinement, and the relief he seeks entails a speedier release from that  
3 confinement, his sole federal remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S.  
4 475, 499 (1972). A prisoner challenging the denial of good time credits is, in effect, claiming  
5 that his sentence should be shorter. His sole remedy is habeas corpus. *Toussaint v. McCarthy*,  
6 801 F.2d 1080, 1096 n. 14 (9<sup>th</sup> Cir. 1986). Therefore, this Court must construe Mr. Lumpkin's  
7 challenge to the denial of his good time credits as a habeas petition.  
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9 In addition, prisoners in state custody who wish to challenge the length of their  
10 confinement in federal court by a petition for writ of habeas corpus are first required to exhaust  
11 state judicial remedies, either on direct appeal or through collateral proceedings, by presenting  
12 the highest state court available with a fair opportunity to rule on the merits of each and every  
13 issue they seek to raise in federal court. *See* 28 U.S.C. § 2254(b)(c); *Granberry v. Greer*, 481  
14 U.S. 129, 134 (1987); *Rose v. Lundy*, 455 U.S. 509 (1982); *McNeeley v. Arave*, 842 F.2d 230,  
15 231 (9<sup>th</sup> Cir. 1988).  
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17 State remedies must be exhausted except in unusual circumstances. *Granberry, supra*, at  
18 134. If state remedies have not been exhausted, the district court must dismiss the petition.  
19 *Rose, supra*, at 510; *Guizar v. Estelle*, 843 F.2d 371, 372 (9<sup>th</sup> Cir. 1988). As a dismissal solely  
20 for failure to exhaust is not a dismissal on the merits, *Howard v. Lewis*, 905 F.2d 1318, 1322-23  
21 (9<sup>th</sup> Cir. 1990), it is not a bar to returning to federal court after state remedies have been  
22 exhausted.  
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24 Mr. Lumpkin was carefully instructed as to the elements of a Section 1983 action and  
25 was given ample opportunity to show cause and properly plead such an action in this Court. He  
26 has failed to do either. Although Mr. Lumpkin named individual defendants in his proposed

1 amended complaint, he has failed to allege a claim under 42 U.S.C. § 1983 because he is still  
2 raising an issue for which there is no Constitutional protection. As Mr. Lumpkin was previously  
3 advised, there is no constitutional or inherent right of a convicted person to be conditionally  
4 released before the expiration of his sentence as he has no liberty interest protected under the  
5 Fourteenth Amendment in an early release into community custody. *See, e.g., Carver v.*  
6 *Lehman*, 550 F.3d 883, 888-889 (9<sup>th</sup> Cir. 2008).

### 8 III. CONCLUSION

9 Plaintiff has failed to state a claim as a matter of law under 42 U.S.C. § 1983 and has  
10 failed to exhaust his state court remedies. Therefore, this action should be **dismissed without**  
11 **prejudice.** Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
12 Procedure, the parties shall have ten (10) days from service of this Report and Recommendation  
13 to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a  
14 waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985).  
15 Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for  
16 consideration on **June 19, 2009**, as noted in the caption.

18 DATED at Tacoma, Washington this 28th day of May, 2009.

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23 Karen L. Strombom  
24 United States Magistrate Judge  
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